# In the Supreme Court of the United States

**OCTOBER TERM 1943.**

**No. . . . . .**

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### OPINIONS OF THE COURT BELOW.

The first opinion herein of the United States Circuit Court of Appeals for the Sixth Circuit was handed down on October 14, 1943, Reported in 138 Fed. (2nd) 351. The Petition for Rehearing was denied on February 9, 1944, and a short memorandum, in regard thereto, was filed with the denial of a Rehearing. Both are attached hereto.

### II.

### JURISDICTION.

(a) The statutory provision believed to sustain jurisdiction in this Court is Section 240, amended, of the Judicial Code, 28 U. S. C. A., Section 347 (a).

(b) The judgment sought to be reversed was rendered on October 14, 1943. A Petition for Rehearing was duly

filed and was denied on February 9, 1944. The Court of Appeals on February 15, 1944, entered an Order in Cases Nos. 9241, 9242, 9243, staying the Mandates herein for 30 days in order to afford Appellants an opportunity to make Application to this Court for a Writ of Certiorari and further provided therein, that said Mandates shall be stayed for such additional time as may be necessary to a final disposition of this cause, if a Petition for Certiorari is filed in this Court.

(c) The nature of the case and the rulings relied upon as a basis of this Court's jurisdiction are shown in the Petition for Certiorari hereinbefore set forth and hereafter in this Brief.

## III.

## STATEMENT OF THE CASE.

Reference is here made to the summary statement contained in our Petition which is adopted and made a part of this Brief.

## IV.

## ASSIGNMENT OF ERRORS.

The assigned errors intended to be urged are:

1. The Trial Court and the Circuit Court of Appeals erred in holding that there was sufficient evidence to sustain the conviction of the Appellants.

2. The Trial Court and the Circuit Court of Appeals erred in not holding that the verdict of conviction and judgment of the Court were contrary to law.

3. The Trial Court and the Circuit Court of Appeals erred in not holding that the Petitioners were denied a fair trial as guaranteed to them by the Constitution of the United States of America, Amendments, Section VI.

4. The Trial Court erred in refusing to admit testimony and evidence on behalf of the defendants to establish good faith and state of mind of defendants, thereby preventing defendants from establishing their defense and the Court of Appeals erred in sustaining the judgment of the Trial Court on said point.

The record does not show affirmatively that appellants were not prejudiced thereby.

5. The Trial Court and the Court of Appeals erred in not holding that upon the undisputed facts of record in evidence that the acts of the defendants upon which the verdict and judgment of the Court were predicated were as consistent with innocence as with guilt and that they were entitled to the direction of a verdict of not guilty by the Trial Court at the close of all of the evidence.

6. The Court of Appeals erred in sanctioning a departure from the accepted and usual course of judicial proceedings by the Lower Court in not holding that as a matter of law the Trial Court denied to the Petitioners the right to a speedy trial or the right to any trial as provided by the Constitution of the United States.

7. That the Circuit Court of Appeals, in rendering its decision, failed and refused to apply the law as declared by the Circuit Courts of Appeals of the United States and as declared by the Supreme Court of the United States, affecting the substantial rights of the appellants on the record.

The Circuit Court of Appeals recognized, by its opinion, that there was no direct proof or testimony against the appellants at the trial of the issue, that the appellants knew of or knowingly entered a scheme to defraud or knowingly used the mails therefor; that there was no direct testimony or proof that the appellants knew of, or knowingly entered a conspiracy with intent to use the mails therefor.

The Circuit Court of Appeals by its decision in effect found that the case as against appellants rested solely on circumstantial evidence and catalogued the circumstances upon which it relied, to affirm the conviction of appellants.

The circumstances so relied upon by the Circuit Court of Appeals in affirming such convictions and the circumstances which the jury of necessity had to rely upon, for conviction upon the essential elements of the alleged offenses set out in the indictment, taken separately and collectively, were consistent with the presumption of innocence.

8. Error was apparent upon the record in the Transcript of the proceedings had at the trial in this to-wit:

The Trial Court admitted testimony and evidence objected to by appellants prejudicial to appellants which was incompetent and irrelevant. The record does not show affirmatively that appellants were not prejudiced thereby.

The Trial Court admitted evidence prejudicial to appellants when no witness was on the stand over the objection of a defendant therein, thereby violating the right to confrontation of witnesses guaranteed by the Sixth Amendment to the United States Constitution, and the record does not show affirmatively that appellants were not prejudiced thereby.

9. For other errors apparent upon the record prejudicial to these Petitioners resulting in violation of their constitutional guaranty and rights.

In all of the foregoing the Decision of the Circuit Court of Appeals in affirming the convictions of the appellants was in conflict with the applicable, controlling decisions of the Circuit Courts of Appeals and of the Supreme Court of the United States.

## V. ARGUMENT.

### I.

**THE PRINCIPLES OF LAW INVOLVED HEREIN ARE VERY IMPORTANT TO THE GENERAL PUBLIC AND ESPECIALLY TO THOSE WHO ARE ACCUSED OF A CRIME AND BROUGHT TO TRIAL IN A COURT OF LAW. ARTICLE VI, AMENDMENTS TO U. S. CONSTITUTION, GUARANTEES ACCUSED A SPEEDY TRIAL. ACCUSED WERE DENIED A SPEEDY TRIAL.**

The trial of this case began on September 21, 1941. The hours of trial were set by the Court as from 9:30 A. M. until 1:30 P. M. (Record, page 2311.) Counsel agreed to these hours. However, at that time no one of defense counsel could foresee that the Federal prosecutors would offer and read in evidence hundreds of documents, all of a similar nature, and 99% of which were cumulative evidence; none of counsel for the Petitioners had any idea that Government counsel would offer such a tremendous amount of repetitious testimony; no one could foresee that the Court would permit the case to drag so slowly for such a long period of time. After the case had been in progress for a few weeks one of defense counsel objected to the methods being pursued, to the hours of trial, and to the length of time that the trial was taking. The matter was taken up with Government counsel and with the Trial Court in chambers and finally in open Court on December ...., 1941. (Record, page 2312.) Statement of counsel is herewith set forth verbatim as reflecting the true situation at that time. (Record, page 2248d.)

Between October 10, 1941 and November 27, 1941 ten trial days had been consumed. During this period of time only twenty-four witnesses were presented by the Government and examined. (Record, pages 5 to 617.) Between October 27, 1941 and November 17, 1941 only twenty witnesses were presented and examined. During this period of time thirteen and one-half trial days were consumed and less than two witnesses per day were examined. (Record,

pages 617 to 1202.) These are examples of what transpired in the Trial Court before the motion was made by counsel on January 6, 1942 to dismiss for the reason that a speedy trial had been denied Petitioners.

A reading of the record, pages 2247, 2248, 2248(a), 2248(b), 2248(c), 2248(d), 2248(e), 2248 (f), and 2248(g) will show some of the unnecessary talk by counsel for the Government and by the Court, and the inexcusable methods used by the Government. In this connection, the prosecutor even introduced evidence that pertained to a dead defendant. (Record, page 2228.) Twelve exhibits pertaining to a transaction she and her dead husband had with the dead defendant were introduced and read to the jury. The only conceivable purpose of this testimony was to show the common plan of those charged and certainly if it had not been shown at this state of the proceedings, it would never be shown.

2248(d)—Transcript of Testimony:

"Mr. Wiedemann: At this time on behalf of the defendants Jacoby and Molloy we move that the Court dismiss the indictment as to all ten counts on the ground that to compel these men to stay here longer and answer the charges made against them would be a denial of their constitutional rights to a speedy trial under the Constitution of the United States.

"My argument will be briefed on my motion.

"As Mr. Bigger has well stated, it must certainly be very apparent to the Court, as to everybody else who has had any connection with this case, that these defendants have been put to a terrible hardship to come here day after day since September 23rd, 1941, and answer the charges made here, and especially is that hardship almost unaccountable when the Government has spent all this time in a vain attempt, as we think, to simply show a scheme here and during that period of time have not produced any substantial evidence in our opinion, and we say that sincerely, that shows any scheme here to defraud. There certainly

must be, if your Honor please, some limits to which the Government must be confined in its presentation of evidence against the defendants in a criminal case. Certainly no man should be compelled to sit in a court room, and sit there day after day listening to the prosecution put on witness after witness who does not in any way connect him with the charge in the indictment, and sit there day after day, and week after week, and month after month, without having some protection thrown around him and without having the right after a certain length of time has gone by to have the Court say: 'Now, Mr. Prosecutor, you have gone far enough with your evidence in this case.' We will say that Mr. Jacoby and Mr. Malloy have waited here now three months and during that period of time there has not been one scintilla of evidence offered against them or either one of them. Now, Mr. Prosecutor, let us hear what you have to say, let us hear the evidence against these two men, and let us hear it quickly or else the Court will under the Constitutional rights of these men to have a speedy trial dismiss them from the case.

"If your Honor please, none of these men who are defendants in this case are rich men, as Mr. Bigger says. Some of them are working nights in an attempt to support themselves and their families while this trial goes on. Most of them live at points that are distant from the scene of this trial and they have to drive here day after day and work nights, and then come here and spend their days here in this courtroom, and all during that time the Government goes on presenting evidence that I suppose is an attempt on the part of the Government to prove a scheme, but which I say to this Court, and which must be apparent to everyone, that there are only isolated instances on the part of the Government to show that certain salesmen made certain statements that were not lived up to.

"Now, if the Court please, I think the time has been reached in this case when the Government ought to either be compelled to connect up these two defend-

ants and do it speedily, or I think the charges against them should be dismissed. I say that I think our motion is well taken at this time and should be sustained at this time, and the defendants dismissed, and I think that if they are not dismissed they are denied their right of a speedy trial under the Constitution of the United States and the state of this record."

The Court lost no opportunity to bring to the attention of the jury specks of evidence that Government counsel had not seen. Testimony set forth on pages 2234, 2235 and 2236 are examples. On these occasions the Court talked and talked and talked. Other parts of the record to illustrate this point are found on pages 2193 to 2313. A written Motion to Dismiss for the reason that the defendants were being denied their right to a speedy trial was considered and overruled by the Trial Court on January 6, 1942. (Record, page 2248(d).)

Thereafter, after several weeks had gone by in which the proceedings continued to drag and counsel continued to object, the Court finally changed the hours but without changing his methods of supervision, and the gross slowness continued. The trial was not concluded until April 1, 1942 when the case was sent to the jury. Thereafter, the jury was allowed to deliberate for six days before it reached a verdict.

The Trial Court was not pleased when counsel objected to the delay and the refusal to grant a speedy trial. We set forth herein parts of a statement by the Court made immediately after the jury had returned its verdict of guilty which shows his attitude in this regard and our point that this question had been brought to the attention of the Court not only in open Court but on other occasions:

"Gentlemen, there has been intimation from time to time in this case, not unkindly, but nevertheless rather firmly, that this case had taken too long, that the Government was too long in presenting their case, the jury was out too long and too much time has been

taken. * * * The matter is now in the hands of the Court and any further delay would be mine so I shall not delay this matter any longer than I deem it necessary. I will dispose as to all the defendants who have been found guilty on Friday morning of this week at 9:30. * * * So on Friday morning at 9:30 all the defendants will come here prepared. If they are sentenced to jail or a penal institution there will be no bail to anyone. They will have to go to a jail or penal institution unless bail is granted by the Circuit Court of Appeals * * *. When you come on Friday you will come with that kind of arrangements. For the benefit of everyone and particularly for the benefit of Mr. Wiedemann, I will see there is no further delay in this case."

The utter disregard by the Court and the prosecuting officials of the Government of the rights of these defendants to a speedy trial is apparent on almost every page of the record and it is so gross and so inexcusable and such conduct strikes such a blow at such a fundamental right as to require this Court to exercise its supervisory powers herein and to admit and reverse this case. Holding these men in Court for such an unnecessarily long period is further aggravated by the fact that these Defendants filed Motions for separate trials and also signed waivers so that it would not be necessary for them to be present at all times. These Motions were denied, the waivers disregarded, and the Court *ordered* the Defendants to be present at all stages of the proceedings. (Record, pages A5, A6, A7 and A8.)

The defendants were not given a trial as contemplated by the Constitution. In the place of a trial to which they were all entitled they were forced to attend before the District Court for a period of six and one-half months while a disconnected series of episodes were laboriously and slowly dragged from the mouths of hesitant and confused witnesses in an effort by the Government to show them guilty of offenses which they had not committed. It

is gross understatement to say that the jury could not possibly have understood the issues involved.

Article VI of the Constitution of the United States provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial * * *."

In the face of this record, how can any Court say that these Defendants were given the protection afforded by this provision of our Constitution?

## II.

**THE PRESUMPTION OF INNOCENCE LIES AT THE FOUNDATION OF OUR CRIMINAL LAW. THE UNITED STATES SUPREME COURT UTTERED THAT STATEMENT. THE ENFORCEMENT OF THE PRINCIPLE IN A CRIMINAL CASE.**

> "That the defendant is presumed innocent until proven guilty beyond a reasonable doubt" is just as important and just as sacred as the guarantee of "Life, Liberty and Property."

Both of these guarantees lie at the foundation of our fundamental institutions. They are a part of our traditions. This "presumption" must be recognized as a living, vibrant, vital, indispensable force, essential to accused citizens and to the preservation of our institutions.

To ignore it, to evade it, to emasculate it, to treat it lightly, is to reduce the trial of a criminal case to the level of a civil case.

When that happens, our constitutional system becomes a mere memory, not even a heritage.

Our only guide in this matter and in this case, is the applicable law as laid down by this Court and by the Circuit Court of Appeals.

If those decisions and great precedents are living symbols and assurances of protection, if this Government has not "become a government of men and is still a gov-

ernment of laws" then there can be no question, but what this case will invoke the revisory powers of this Court because the decision of the Circuit Court of Appeals in this cause, is in violent conflict with the applicable decisions and precedents of both High Courts.

*This case then becomes one of far reaching importance to the Bench and Bar of the Country and to every citizen, who in the future may be subject to indictment on evidence which is concededly purely and exclusively circumstantial. This is true in view of the full statement made by the Circuit Court of Appeals of the circumstances upon which it relies for affirmation of the conviction of appellants.*

*The Government,* as alleged in the Petition, in their reply brief, C. C. A., p. 2, said, *they could not adequately define the "scheme to defraud and the evidence" because the scheme and evidence are spread over 5000 odd pages of record.* That is *"as the scheme affects the individual appellants."* That is 5000 odd pages of circumstances—the District Attorney made that statement when only the case of the salesmen was before the Circuit Court of Appeals. That can only mean—the indictment "did not inform the appellant salesmen of the nature and cause of the complaint against them" as required by the Sixth Amendment to the United States Constitution.

The circumstances related by the Circuit Court of Appeals in its decision, 138 Fed. 2nd 351, are the only circumstances and the only evidence and the only testimony adduced against any of the appellants on the charge either, of

1. Devising a scheme to defraud, and the use of the mails therefor, or

2. Of knowingly entering into an agreement to conspire to use the mails, to carry into effect such a scheme.

Concededly there was no proof or direct testimony of an agreement on the part of any of the appellants as to either offense.

Therefore, the presumption of innocence must be applied to each and every circumstance or chain of circumstances, relied upon for conviction, or for affirmance of conviction.

If reliance is placed on a chain of circumstances and if any circumstance of that chain is susceptible of an inference of innocence, then the jury cannot convict, and in the event of a conviction the Circuit Court is required under the established rule and principle applicable in criminal cases to reverse the conviction.

Where this state of the record exists, the trial court is imperatively required as a matter of law to direct a verdict of acquittal.

Since that rule of action is the declared and established law then the question becomes one of law for the Court. The Court is not empowered to submit the question to the jury for it to find an inference of guilt or innocence.

That can be done in a civil case where the jury renders a verdict on the preponderance of the evidence and no presumption taking the place of proof or evidence—exists in favor of any defense, or in favor of any issue in behalf of the defendant raised by his answer. *Lilienthals Tobacco Co. vs. U. S.*, 97 U. S. 237, 266, 267; *Wolf vs. U. S.*, 238 Fed. (4th Cir.) 906.

This principle of "presumption of innocence" is a rule of proof,—evidence,—existing in favor of the defendant in criminal cases, and the Court and the jury have no discretion in the matter, but are both and each of them, imperatively required to resolve the inference in favor of innocence of the defendant.

The Supreme Court of the United States stated in *Coffin vs. U. S.*, 156 U. S. 434, 452, 456, 461:

> *"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary and*
>
> *Its enforcement lies at the foundation of our Criminal Law."*

**If that presumption as stated by the Supreme Court, lies at the foundation of our Criminal Law,**

Then it becomes highly important and immediately pertinent to inquire, whether that presumption has been applied to the circumstances in this case as it affects the appellant salesmen, and whether it has been applied to safeguard their constitutional and legal rights, or

Whether it has been treated as of no consequence (as stated in *Kirby vs. U. S.*, 174 U. S. 47, 55, 56), or protection to the accused appellants, and whether the Court, in effect, permitted the jury to draw any inference it chooses, from the circumstances, regardless of that presumption, if the jury is the final arbiter and can draw an inference of guilt, from a circumstance which is consistent with innocence then the presumption has no force. It affords no protection.

If the presumption means anything, it must mean, protection. It must have some force. The Courts have said it is sufficient in doubtful cases to turn the scales in favor of the accused. *Lilienthals vs. Tobacco Co.*, 97 U. S. 237, 266, 267.

In a case where the circumstance is unlawful or on its face imports fraud or knowledge of fraud, to the exclusion of innocence then of course the jury would be entitled to draw whatever inference it would choose.

But where, as in this case, the circumstances relied upon are admittedly legal as charged by the District Court to the jury and are not fraudulent in themselves, where they do not import illegality, fraud or knowledge, of either or of criminality, but are such as even the trial court itself admitted, in one instance, when the trial court admitted documents against Holcombe with no one on the stand, apparently relied upon by the Court of Appeals among other circumstances noted, to affirm the conviction, and stated that such circumstance, "was not inconsistent with innocence" (p. 2821, Transcript) then the jury is

imperatively required, and the Court is imperatively required to resolve the circumstance or circumstances in favor of innocence. The Supreme Court has expressed this controlling rule of law in the following language in *Dunlap vs. U. S.*, 165 U. S. 486, 502, 503.

P. 502.

> "The presumption of innocence is a presumption of law that the defendant did not do the things alleged. *This must continue in the minds of the jury, in such a way as to cause the jury to find the defendant, not guilty unless from all the evidence, in the case beyond a reasonable doubt, the jury are convinced that the defendant did things charged against him and knew the facts which constitute the offense.*"
>
> "And this presumption is not overcome by facts which are not plainly inconsistent with innocence." *Wolfe vs. U. S.*, 238 Fed. 902, 906 (4th C. C. A.).

Now the jury cannot ignore a reasonable doubt if the circumstances under the presumption of innocence creates a reasonable doubt. The law creates the reasonable doubt under the presumption of innocence as stated by the United States Supreme Court, in *Coffin vs. U. S.*, 156 U. S. 434, 458, 461. The jury does not create it, or choose to create it. It is the law.

If it is the law and the law creates "reasonable doubt" in a criminal case under the presumption of innocence, then the question of whether a verdict of acquittal shall be directed, where there is no direct proof but where all the circumstances proved and relied upon, are obviously and concededly consistent with innocence, becomes one of law for the Court. "The presumption must continue in the minds of the jury so as to cause them" to acquit the defendant, said the United States Supreme Court, 165 U. S. 502, *supra.*

Stemming from this "presumption of innocence," there are other important principles and presumptions—some positive and some negative, but all designed to protect

and safeguard the fundamental constitutional rights of an accused.

Fraud is never presumed. Bad faith is never presumed. Dishonesty is never presumed. The contrary is presumed, i.e., that the transaction was free of any fraudulent intent unless the act is criminal or fraudulent in its nature or made so by statute. Good faith is presumed. Honesty is presumed. The selling of cemetery sections for profit or on any plan sold herein, was not made illegal or criminal by any statute. Neither did any statute make such selling, a scheme to defraud or a conspiracy.

See *Gregg vs. Lessee Sayre,* 8 Peters; *U. S. vs. Arredando,* 6 Peters, 691, 716; *Dalton vs. U. S.,* 154 Fed. 461, 463; *Lessee Tinker vs. Moorland,* 10 Peters 58, 78; *Farrar vs. Churchill,* 135 U. S. 583, 615.

The circumstances as related by the Circuit Court of Appeals to justify its affirmance of the conviction of the salesmen appellants are found on pp. 355, 357, 358, 360, 361, 138 Fed. 2nd. They are the circumstances which the Court said *warrant an inference* that appellant salesmen devised a scheme to defraud in July 1933, or knowingly entered a scheme to defraud and justify an inference that the salesmen agreed upon a conspiracy in July 1933 to use the mails to carry out such scheme or knowingly entered such conspiracy thereafter.

They are not charged, however, in the indictment with having knowingly come into the *scheme to defraud,* after it had been devised, or with having come into the conspiracy knowingly, after it had been formed.

Neither are they charged with aiding and abetting the substantive offense of devising a scheme to defraud and using the mails therefor.

There is not a single circumstance, related by the Court, which is unlawful or criminal because specifically made so by statute. There is not a single circumstance related by the Court which is fraudulent in itself. There

is not a single circumstance related by the Court which repels and which is inconsistent with the presumption of innocence.

There is no law against agreeing to resell property for 25% to 100% of the amount paid therefor, *if, and when, it can be sold,* as those contracts admittedly provided. There is no law which prohibited selling sections on any plan upon which they were sold. There is no law against any salesman using any list of people or stockholders in any institution by an individual salesman personally—to run down prospects.

The Court of Appeals said Marshall purchased "sucker lists" and gave them to some of the salesmen in order to carry out the plan conceived by Marshall.

There is no evidence or circumstance that any list was a "sucker list," there is no evidence that the salesmen used any such kind of a list. There is evidence that a very few salesmen did use a list of stockholders in building and loan and financial institutions and other corporations, but it was not used to mail out inquiries and soliciting prospects. No prospect was procured that way. All sales were made by personal solicitation. No sales was closed through the mails. The Government failed, when they attempted to stamp these lists as "sucker lists" and the Court sustained an objection to that characterization. (See pp. 4280-4281 Transcript.) Yet the Court of Appeals called them "sucker lists."

There is nothing illegal or fraudulent about that and though one or two did use a list of investors, that cannot be imputed to any other salesmen, under the presumption of innocence.

There is no law against a salesman making more than one sale of cemetery sections or trying to get a good allocation or monthly payment for his customer and asking that payments provided in the contract be made, so as to have a satisfied customer and so as to enable him to make other

additional sales. It was not illegal to use the mails to either sell a cemetery section or to mail checks payable on any contract.

These salesmen were admittedly licensed by the state to sell such sections. (pp. 4619, 4637, 4644, 4667, Transcript.) The plans had been substantially approved by the State through the Director of Commerce. (pp. 3529, 3539, 3878 to 3880, 3540, Transcript.)

It is a safe and reasonable assumption, since the Circuit Court of Appeals painstakingly catalogued the circumstances which it deemed sufficient justification for conviction and an inference of an unlawful agreement, that if there had been any other, more damaging, unlawful or criminal acts evidenced that the Court would have related them. But the Court did not.

When the Court of Appeals said that "Marshall may have imposed on some of his salesmen, and that others acted in good faith."

Did the Court refer to Clark who put $30,000.00 of his money in the purchase of sections on the same terms as other investors, to many other salesmen who with their families spent thousands of dollars in the purchase of sections on the same terms as other investors such as Pardee, Riggle and many other salesmen as the record indisputably discloses?

Did the Court refer to such salesmen as Neidigh and McClure and others, Appellants, who engaged mostly in selling sections at retail, showing their obvious faith in the project and their clear intention to assist in carrying out contracts, which they and other salesmen had sold to the so-called investors. The Court of Appeals in its decision recognized and stated that some of the appellants who sold at wholesale, sold also at retail. *That can only mean, they intended to see their contracts carried out. That does not import a scheme to defraud, or even fraud, or an agreement or conspiracy.*

Or, did the Court refer to such men as Holcombe who approached the County Prosecutor in April 1936 and said:

> *"He was thinking of selling sections in this cemetery,"*

referring to Glen Rest, and that he heard he had investigated it and whether he found anything wrong, and whether it was all right for him to sell and *who in April 1936, thereafter,* became a licensed cemetery salesman for this project and that Hoskins told him "Yes, he investigated, found nothing illegal or wrong, and there was no reason why he should not go ahead and sell." (pp. 4560, 4573, Transcript.) The Court refused to let Holcombe have the benefit of this testimony as will be pointed out hereafter.

To whom did the Court refer when it said some salesmen promised to double the money, some said it was safe, some said the Government was behind it, and some did this and some did that. And on what principle or circumstance under the presumption of innocence did the Court impute these things to other appellants who did not say or promise such things.

To whom did the Court refer. The Court could not have referred to all of them, because the Court said some *were guilty of one type of conduct and some were guilty of another type of conduct.*

There is no principle of law of which we know, in a criminal case, under the presumption of innocence, which permits any Court to impute to one jointly charged—any so-called guilty act of or any act of another party of any kind, of which no specific knowledge is established. *This must be true unless a defendant is presumed guilty instead of innocent.*

It is obvious from the Court's opinion that it placed reliance chiefly on the testimony of Marshall and on the contracts of a few made in Marion to justify its affirmance.

His testimony covered many conditions covering a period of time before any salesmen had anything to do with these cemeteries and after May 18, 1938. Most of the salesmen appellants came in long after Marion was practically sold.

Why should these salesmen be prejudiced by anything Marshall said or did, but of which there is no evidence of knowledge or participation with knowledge on the part of any salesmen.

All of this has been brought about and innocent salesmen are asking a hearing in this Court, because the Trial Court and the Court of Appeals failed to enforce the Presumption of Innocence as applied to facts and circumstances which admit and do not exclude an inference of innocence,

And because the Appellate Court failed and refused to recognize the injunction laid down by the Supreme Court,

**That "the enforcement of that presumption lies at the foundation of our criminal law."**

In relating the circumstances evidencing guilt, the Court of Appeals frequently stated its conclusions or inferences, as if they were a fact.

It will be noted that the Court of Appeals said:

> "The salesmen made successful requests to Marshall to repay cash profits when there were no profits."
>
> "Similar requests that the company re-purchase lots from certain investors in order to carry out the deception that the plan actually doubled the investments."
>
> "Arrangements that discrimination be shown in the payment of promised returns, so that certain investors would be paid so as to enable the making of other sales."
>
> "Representations that cemeteries are necessary."

It is apparent from the foregoing that the words "in order to carry out deception," "to repay cash profits when there were no profits" so that "certain investors would be paid large apparent profits," are all either legal conclusions and assumptions and not facts, or

They must have been predicated on some circumstance which openly reveals a direct connection between that inference and the material circumstance proved. This must be true under the decision of *Manning vs. Mutual Life Insurance Co.,* 100 U. S. 693, 697.

Since sections were sold at retail for an amount of $1,332,880.66 (p. 2570, Transcript), at prices ranging from $125.00 to $500.00 aggregating 14000 sections, the wholesale salesmen and appellants had a right to believe that the enterprise was a success. *It gave every evidence of legitimacy, as established by the Government's own figures.* Admittedly *the salesmen did not handle the finances, banking, bookkeeping, etc.* They were not officers or managers of the enterprise. There is nothing related, which warrants against the inference of innocence, that they knew that any investor was being paid a profit when there was no profit or that the company promised a profit not intending to pay it. There is nothing related by the Court or apparent in the applications, contracts, deeds or checks issued or money paid, which warrants an inference that appellant salesmen were any part of a scheme to defraud or that they "were carrying out knowingly any deception." The presumption of innocence, good faith, absence of fraud, repel any such conclusion. The Court and Jury must resolve the inference in favor of innocence.

The request of any salesman that a contract be carried out, that payments be made as provided in the contract, that Forest Glen, Inc., repurchase a section as provided in a contract, even though he made it, in the hope and for the purpose of enabling him to make other sales to the same person or other, does not warrant an inference of knowledge and intent that "there were no profits," that "the purpose was to carry out the deception," that the purpose was to pay certain investors, "apparent profits." To justify these inferences all the papers would have to be criminal and illegal or there would have to be direct proof of the

fact. It is conceded and a matter of record there was no direct proof of the material elements of the offense, or knowledge or agreement on the part of the salesmen. It is also a fact the Court charged the jury the papers and sales were not unlawful. Therefore, the only basis for the Court and the Jury's inferences, were inferences from inferences. That cannot be done under *Manning vs. Mutual Life Ins. Co.*, 100 U. S. 693, 697.

The expression of opinion that "cemeteries are necessary" (and on the record it can only be an opinion), cannot be the foundation for a charge of fraud, to say nothing of trying to infer an agreement to devise a scheme to defraud. See *School vs. McAnnulty,* 187 U. S. 107. *Are not cemeteries necessary?*

It is important here to note what the Circuit Court of Appeals said in its opinion about inferences from these circumstances to establish a scheme to defraud, and a conspiracy, with intent to use the mails.

After reciting the circumstances related herein and a few others, the Court said it was for the jury to draw an inference from what the witnesses said the salesmen said which was incorporated in the agreements and from their asssociation with Marshall, and from their conduct, whether they were made pursuant to a scheme to defraud, whether there was an understanding with Marshall, whether there was an intent to use the mails and whether they entered a conspiracy (pp. 358, 361, 138 Fed. 2nd), which of necessity, must mean an agreement. If there was no formal agreement, the circumstances must create an unlawful agreement to the exclusion of innocence.

A situation is related herein from pp. 2820, 2821, transcript, wherein the Trial Court conceded, that a circumstance which it permitted to go to the jury was consistent with innocence, but the Court said the jury might draw another inference from it, an inference of knowledge and guilt. Such a ruling strikes at the very foundation

of the defense of an accused, as violating the principle of the presumption of innocence.

Another situation involving the same question and non-observance of this principle but involving the applications, contracts and deeds is found on pp. 1823, 1824, transcript.

The witness called by the government could not testify as to any misleading statement or misrepresentation upon the part of the salesmen. The testimony involved, pp. 1805 to 1886 inclusive, is a labored, seeming effort to get the witness to say something damaging, without success. The exhibits in this case begin with Government Exhibit 633, p. 1806, application etc.

On pp. 1822, 1824, transcript, motion was made by defendants to strike out all testimony and exhibits on ground they do not import fraud or scheme to defraud. The Court said (p. 1823):

> "I will overrule the objection and instruct the jury that there is no testimony here * * * that Mrs. Hoffman, mother of the witness, was induced by anything that was said to enter these contracts or make these applications."
>
> "I say that because the witness here while he remembers that Mr. Mallott was there, he has no recollection of what the conversation was, so we have no testimony, but *you may take these exhibits later on when the case is finally submitted to you for the purpose of finding out what the exhibits show if anything with regard to the charge that is contained in the indictment in this case; that is to say that the defendants were engaged in a scheme to defraud, for that purpose.*" (Italics ours.)

The district attorney on p. 1823, transcript, said they were competent "for what they were worth and to determine whether or not that is a promise to give a definite profit." On p. 4365, transcript, he conceded it was not illegal to raise money by selling these sections at wholesale to

build the cemeteries and reselling them to pay a profit to the investors who furnished the capital for development.

The Court charged the jury later, that these applications, documents, contracts, deeds, etc., were not illegal in and of themselves, that the sale of the sections were not illegal.

This is what took place.

Bigger, page 4364:

"Now I am coming back to the other question which I have persisted in and which has been touched upon by Mr. Crawford, and that is this:—And I want to get it into the record, because this whole scheme seems to be founded upon that proposition, but has been evaded. Is it the contention of the Government that the sale of these sections for investment purposes and the resale for utility purposes, under this plan and on the record under these contracts and deed is, itself, illegal?

If that is the situation we again request the district attorney to state his position which in my opinion has been evaded heretofore in this record. We believe that as a salesman, that we have a right to know the position of the district attorney, of the government upon that matter. If that is the position of the government and if that is the law, if the Court takes that view that is the law, no one here can put up a defense, because we did admit that we sold, we are convicted before we start. But if it is not illegal in itself, if it is not illegal to make these sales, then that is another question, then we have a chance for a defense.

We believe we have a right to know that proposition and to know the district attorney's position upon that matter, on the record of this case in the indictment.

Mr. O'Donnell: I will try to answer Mr. Bigger * * *" (page 4365).

Page 4366, Transcript:

"Now answering Mr. Bigger's question, no, we do not claim it was illegal to sell cemetery lots, but it is

the mode of the *scheme*, the *whole* thing which was illegal."

Then he said the fraud was taking more than was necessary for development purposes. The Federal Court held in *Van Tess vs. U. S.*, 292 Fed. 513-519-521 (Ohio), the salesmen could not be charged with knowledge of that fact where they are just "salesmen and sell more than the management can fulfill."

Then this followed (pp. 4366, 4367):

> "Mr. Bigger: Then, I understand, Mr. O'Donnell, it is not the contention of the government that it was fraudulent or illegal to go out and raise the money which really was necessary to build and develop the park and pay a profit upon that * * *?
>
> "Mr. O'Donnell: No.
>
> "Mr. Bigger: That is all right then."

Now in view of the Court's charge to the jury, the admission of the Government, *supra*, the statement of the Circuit Court of Appeals, that "the scheme to defraud and the conspiracy consisted in selling cemetery sections for investment" (although the Government and Court said was not illegal or fraudulent) if all that is all true, then, there must *have been something besides* doing what was lawful—as was done by the salesmen, essential to constitute that scheme to defraud, and knowledge and agreement must be established by circumstances, or facts—other than the sales—admittedly lawful. None such have been pointed out by the Government or the Court of Appeals. Those acts in selling, etc., were consistent with innocence.

It could only consist as stated in the *Durland* case in an intent not to carry out the contract, but that intent on the admissions and concessions set out above, could not under the presumption of innocence be inferred, or imported from the salesmen doing that which was legal. If that intent existed on the record under the Court of Appeals decision, it could exist only in Marshall's mind and knowledge.

No one has pointed out where any legality in the sales for investment ended, and where any illegality began as it affected any salesmen.

There is nothing whatever in this record or noted by the Court of Appeals disclosing any fact or circumstance warranting an inference that the salesmen knew what the parks cost, what it cost to develop them, expenses etc., or that more money for investment was taken in, than was necessary to develop and sell the Parks.

Here, is another impressive example of what harm resulted to appellants by submitting a mass of exhibits and circumstances to the jury, which were consistent with innocence, even though some may draw an inference of guilt, because harm is presumed where the record does not show affirmatively that he was not harmed.

*Kirby vs. U. S.*, 174 U. S. 47, 55, 56:

> "*The presumption of innocence of an accused* * * * *attends him throughout the trial*, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt."

If that presumption attends the accused throughout the trial then it attends him on a motion for a directed verdict, or a demurrer.

Of what avail is that presumption, if the jury can draw any inference it pleases? How does submitting such circumstances to the jury for their determination

> "lead to the enforcement of that presumption," which "enforcement" the Supreme Court says "lies at the foundation of our Criminal Law."

In a civil case, on a motion for a directed verdict, where an inference can be drawn in favor of the party against whom the verdict is sought, then such party must be given the benefit of the inference. In a criminal case, on a motion for a directed verdict, the rule still operates that the defendant must be given the benefit of the presumption of innocence. The trial Court said in effect,—

The inference must be resolved in favor of the Government, on the basis of the rule that the most favorable construction in favor of the Government must be given on the motion, p. 3380, transcript.

By the Court:

> "On these motions and the demurrer, the evidence must be considered in the light most favorable to the Government."

We never knew, the protection of this presumption was lost in a criminal case, until the defendant, under that principle, is proven guilty beyond a reasonable doubt. We find no authority to sustain that position under the Federal Decisions. It would seem this Court must now rule on that important question, to an accused. Because if this presumption of innocence is neutralized or nullified at any stage of the proceedings, before verdict, the Bench and Bar of the Country should know it. It is not a question in this matter of the Court weighing the evidence, as the trial Court said.

*It is a question of the Court applying the law, which it must apply at all stages in favor of an accused.*

If the precedents on this question as pointed out in the Circuit Court of Appeals and the Supreme Court control and the presumption of innocence has any force, that statement of the Court as to the unrestrained power of the jury in a criminal case shows the decision is in conflict with the applicable decisions of both courts. It is so important as to call for the revisory powers of this Court.

*What the Circuit Court of Appeals had in mind and the basis of the argument of the Government* was, that because the appellants did things which (the Court said were legal) and assisted Marshall in raising this money, "*that they must have known* that he did not intend to carry out his agreement." This is clear from the trial court's own statement (p. 3388, Transcript) where the Court showed unmistakably it was applying the rule of civil cases and in

practice, in this case denying defendants the presumption of innocence. But the Circuit Court of Appeals and the United States Courts have said that citizens cannot be convicted in the United States Courts under the presumption of innocence upon any such assumption, *Wolf vs. U. S.*, 238 Fed. 902, 906 (4 C. C. A.). Because there must be evidence of an agreement, which repels the presumption of innocence.

It appears from the decision of the Circuit Court of Appeals in this case that the fundamental error (of approach—at least) is to be found in this:

The Government cannot rely on "acts done which merely aid an unlawful conspiracy or the carrying out of a scheme to defraud (assuming there was one, which must be proved before any evidence of alleged co-conspirators is competent) to establish an agreement either *as to the conspiracy* or *the scheme to defraud*. *U. S. vs. Falcone*, 311 U. S. 205, 207; 25 Mich. 119, relied on by Court in its decision herein; *U. S. vs. Falcone*, 109 Fed. 2nd, 579, 581, and other cases cited herein on participation and doing acts in furtherance of scheme and conspiracy.

> "In order to constitute due process of law in this matter * * * the indictment must set forth the facts which constitute the alleged transgression, so distinctly, as to enable the accused to prepare his defense." *Fontana vs. U. S.*, 262 Fed. 283, 286.

*The offense here basically is, or was, an alleged scheme to defraud, as distinguished from mere fraud or taking money by false representations,* as said by this Court, and the using of the mails therefor.

On the admitted facts, under the *Durland* case, 161 U. S. 306, 313, 314, the only "scheme" which could possibly exist, was that Marshall, when he devised the scheme, did not intend to carry it out, or carry out his contracts.

*That charge could not be left to intendment or implication, as was done in this case. Pettibone vs. U. S.*, 148

U. S. 197, 202, 210. The court can search in vain in this indictment for anything for any charge except "that Marshall paid out profits which were not profits and that in some instances investors were paid out of investors' money," a fact, which on the Court of Appeals decision (the salesmen appellants, all having come in long after all plans were conceived and completed) so far as the appellants are concerned, is consistent with innocence, because it is conceded the salesmen had nothing to do with devising the plans in July, 1933, the bookkeeping, banking finance, operation or administration, and that sections were sold at "retail aggregating $1,370,000.00 and $340,000.00 in cash on that amount was taken in by May 18, 1938."

Where then are the facts alleged, constituting an offense, "the alleged transgression" against the salesmen, *under the presumption* of innocence, because the indictment, the United States Court said, must be tested by that presumption. *Fontana* case, *supra.*

Under the presumption of innocence and good faith and honesty the contrary must be presumed. This is especially true since the Court charged the jury (pp. 5332, 5333, Transcript):

> "That the sale of sections in the cemeteries * * * and the taking of the applications by the salesmen and dealers, for the purchase of such sections was *not in and of itself illegal,* * * * nor was it unlawful to execute the documents, by whatever name they may be called—evidencing the right to use such sections for burial of the dead."

The District Attorney at the trial said it was not illegal to sell sections to raise money to develop cemeteries and re-sell them for utility purpose to pay a profit to the investor. (p. 4368, Transcript.)

And since every deed executed at wholesale or retail specifically provided that such section "could be used only for burial purposes" plainly printed.

And since every agreement to resell specifically provided that Forest Glen, Inc., would resell it, as and when

the demand for retail sections enabled Forest Glen, Inc., to resell it.

And since *Government witness O'Brien testified* that the records show *Holcombe* (and this included all salesmen) as such had nothing to do with *the company except as a salesman, "that he had nothing to do with the administrative affairs of Forest Glen, Inc., or the cemeteries."* (p. 2650, 2654, Transcript.)

And since it is conceded that the salesmen had nothing whatever to do with the operation, management, financing, banking, bookkeeping or correspondence of Forest Glen, Inc., or the cemeteries, and were only salesmen and paid only a commission, and did not in fact devise the scheme, whatever it was.

Where then is the circumstance or chain of circumstances which imports an agreement or knowledge or warrants an inference of either an agreement or knowledge, and which shows an open visible connection between the essential fact to be proved, viz:

> "An agreement and knowledge of a scheme to defraud," or
>
> "An agreement and knowledge of a conspiracy with intent to use the mails to carry out the scheme to defraud."

It is apparent, since the Government as pointed out above admits that the record shows wholesale sales aggregating $1,800,000.00 and sales at retail of $1,370,000.00 and that the parks were developed and the 10% was paid into the endowment funds in cash as provided in the contracts.

Therefore, if a *"scheme to defraud existed"* as distinguished from mere fraud as generally known to law, (for the statutory offense necessarily involves "a scheme to defraud") it had to exist under the *Durland* case, 161 U. S. 306, 313, 314, in the mind of Marshall, which requires that there must exist "an intention not to carry out the

contract'' and knowledge that such contract could not possibly be carried out.

It could not exist, where the only circumstances and evidence shows that salesmen are doing what is legal; what they believe they have a right to do and doing things which warrant an inference of innocence under the presumption of innocence.

This Court said a conspiracy cannot be predicated on what appears only to be a lawful act. See *U. S. vs. Beggs*, 211 U. S. 507, 517; *Fain vs. U. S.*, 209 Fed. 525, 531.

Therefore, the scheme must be predicated on the *Durland* case, that is Marshall did not intend to carry out these contracts. That may be the reason the Circuit Court of Appeals found and decided that Marshall alone devised the scheme and laid all the plans, and caused everything to be done before he called in the salesmen. He created the corporations and called in the Trustees first.

This is further strengthened by the statement of the Circuit Court, that the *''project''* not the *''scheme to defraud''* was *similar to the so-called Ponzi case. This case in fairness, on the case made by the Government, could not be likened to that case.* In the *Ponzi* case, Ponzi took money from investors agreeing to double their money by reinvesting in Foreign Exchange. He never invested anything in Foreign Exchange but did pay back double profits, only out of the money paid in by investors. So that Circuit Court of Appeals did have in mind the principle and limitation announced in the *Durland* case, to-wit:

''That there was no intention to carry out the contract.''

In this case everything was admittedly done at least as far as the salesmen could know to carry out the contract.

Retail sales, out of which ultimate profits so-called were said to be paid, aggregated $1,370,000.00 in 4½ years for 14,000 sections and 33,000 remained to be sold.

The investors paid in $1,800,000.00. The cash paid on retail sales as of May 18, 1938, was $340,000.00. The payments on these contracts was by the month. The payments on the wholesale contracts run for 2 to 5 years after May 1938.

That does not show so far as the salesmen are concerned any circumstance showing an open visible connection between that fact and a scheme to defraud and conspiracy or knowledge of either, under the presumption of innocence.

It is also apparent on the record and on the undisputed facts, that very little, if any, contracts were sold after Marion was sold which called for more than 50 or 25% profit on resale or allocation and most of the salesmen did not sell at Marion. Most of them called for 11% profit. But the Court of Appeals is attributing agreements to double the returns to all salesmen, because a few made such contracts.

Where is the circumstance which warrants that inference against the inference of innocence.

It is clear therefore that the decision of the Court of Appeals is in violent conflict with the controlling decisions of this Court and of the Circuit Court of Appeals on questions affecting the fundamental rights and liberties of American citizens.

The Court further in its decision showing how the salesmen have been prejudiced by conditions following the alleged receivership said that Forest Glen Inc., owed investors on May 18, 1938, $2,141,439.00.

*Dennis O'Brien, Government expert, in answer to a question by Bigger, said this was "liability to investors and lenders; that this did not take into consideration that payments were due in 1 to 5 or 6 years hence from May 18th, 1938; that he could not tell what amount was only due and payable on May 18, 1938. He could not do this although he had worked on the books for months."* (pp. 3270, 3273, Transcript.)

The character of the Court's opinion shows how important it was that the Government be compelled under Article VI of the Amendments to the United States Constitution that each salesman be advised, exactly what it was that was claimed against him. The Demurrers and Motions for Bills of Particulars however were all denied, as alleged in our Petition.

## III.

## CIRCUIT COURT OF APPEALS RELIED ON FACT APPELLANTS PARTICIPATED IN SECURING APPLICATIONS—FOR RAISING MONEY FOR DEVELOPMENT OF CEMETERIES.

Under the applicable, controlling decisions of the Supreme Court and of the Circuit Courts of Appeals, under a charge of devising a scheme to defraud and the use of the mails, and

Under the charge of a conspiracy to use the mails to carry a scheme to defraud into effect,

Mere participation in doing something which aids and assists in carrying out the plans of those who devised the scheme, or in assisting those in a conspiracy to carry out the object of the conspiracy,

Does not warrant a conviction on either charge.

Neither does it warrant an inference of agreement or knowledge of either.

This must be true under the presumption of innocence "which lies at the foundation of our criminal law."

To warrant such an inference, the act and participation must be such an act as in itself is criminal, because the act itself is made criminal by statute, or

The act of participation must be such as on its face is plainly fraudulent and evidences a corrupt motive, and does not admit of an inference of innocence.

To warrant a conviction on the basis of doing something to further the object of the scheme or of the conspiracy, the *act must be of such a nature* as to import an

agreement. Mere participation does not import agreement. The Supreme Court of the United States and the Circuit Court of Appeals have said, it does not. *U. S. vs. Falcone*, 311 U. S., 205, 207; *U. S. vs. Falcone*, 109 Fed. 2nd, 579, 581.

The Court of Appeals herein said that those who associate in a scheme to defraud for the purpose of defrauding, who even associate themselves lightly or tacitly with conspirators, or in a scheme to defraud, are guilty, as if it were not necessary that knowledge and agreement must be clearly established beyond a reasonable doubt—under the presumption of innocence, in order to convict.

There must be evidence of an unlawful agreement, into which the accused entered and if he did something, that he did it knowing that unlawful agreement or scheme.

In those cases cited above, the defendant was accused of belonging to a conspiracy, because he sold materials to a defendant who belonged to a conspiracy. The party selling the material knew the material was to be used in the illegal distilling of whisky, but he did not know of any conspiracy or unlawful agreement to manufacture the whisky. The Court held the fact that the accused sold such material knowing how it was to be used, did not import, and did not warrant an inference of, the unlawful agreement or conspiracy.

In the instant case the salesmen were aiding in doing something which was not only lawful but which the Court charged the jury and which the Government conceded was not unlawful in and of itself. So this being legal, there would be less reason here for holding that what the salesmen did imported an unlawful agreement, or warranted a jury drawing an inference of an unlawful agreement or knowledge, to the exclusion of innocence. The act warranting an inference of unlawful agreement must exclude the presumption of innocence.

Where is that circumstance or act in this case as against appellant salesmen. It surely was not stated by the Court

of Appeals. The mere fact that Forest Glen was slow in making payments due to the financial depression of 1937, 1936, a matter of common knowledge, does not warrant such an inference. That slowness of payment is what led the trial court to say "they must have known." But the United States courts said that the failure to carry out a contract does not import a scheme to defraud or a conspiracy, and the courts take judicial notice of a national financial depression.

Therefore, the decision of the Court of Appeals is in violent conflict on this fundamental principle with the applicable decisions of the Supreme Court and the Circuit Court of Appeals and results in suffering prejudicial departure from the applicable established principles of law.

The precedents and decisions of the United States Supreme Court and of the Circuit Court of Appeals require more than this, as is made clear by the decisions of those courts. Acts done which affect the object of a scheme to defraud, or a conspiracy do not establish the agreement in either case, unless the act is itself unlawful, criminal by statute, or imports an agreement to the exclusion of an inference of innocence.

See *Swift & Co. vs. U. S.*, 196 U. S. 375, 396; *U. S. vs. Young*, 232 U. S. 155; *Hammer vs. U. S.*, 134 Fed. 2nd (5th Cir.) 594-595; *U. S. vs. Britton*, 108 U. S. 199; *Joplin vs. U. S.*, 236 U. S.; *U. S. vs. Newton*, 52 Fed. 275, 282; *McKelvey vs. U. S.*, 241 Fed. (C. C. A.) 801, 807, 808; *Vernon vs. U. S.*, 146 Fed. 121, 123, 124 (8th Cir.); *U. S. vs. Falcone*, 311 U. S. 205, 207, 208, 210, 211; *U. S. vs. Falcone*, 109 Fed. 2nd, 579, 581; *U. S. Santabrey vs. Moore*, see 10 Fed. 2nd 657; *Bebardi vs. U. S.*, 287 U. S. 112, 119; *De Bonaventura vs. U. S.*, 15 Fed. 2nd, 494, 495, 496; *Dickerson vs. U. S.*, 18 Fed. 2nd (8th Cir.) 887; *Linde vs. U. S.*, 13 Fed. 2nd, 59; *Van Tess vs. U. S.*, 292 Fed. 513 (Ohio) 519; 520; *Pelz vs. U. S.*, 54 Fed. 2nd 1001, *Manning vs. Mutual Life Ins. Co.*, 100 U. S. 693, 697, 699.

## IV.

**THE ADMISSION OF WRITTEN DOCUMENTS—PREJUDICIAL. NO WITNESS ON STAND. VIOLATION 6TH AMENDMENT.**

The Court admitted Government's Exhibits 957A to 957V—967C when no witness was on the stand. Objection was made on that ground as violating the 6th Amendment to the United States Constitution. (pp. 3350, 3352, 3353, 3349, Transcript.) None of these were sent through the mails. They were inter-office communications. The manifest purpose was to prejudice one of the appellants, Holcombe.

This was manifest reversible error. It violates a constitutional right. The admission of 967C was indisputably reversible error because the communication was not addressed to Holcombe or written by him. He knew nothing of it. The Government did not attempt to prove any fact stated in that communication by any other witness, although it had the books and could have checked the facts but it did not and the witnesses as to the alleged facts were available but the Government did not call for the books or subpoena any of the witnesses in putting on its case. Miss Bunsford, who is mentioned in the letter was living in Columbus, and had been before the Grand Jury and was available.

The offering, admission and objection to these documents are to pp. 2351, 2350, 2352, 2399, 2401, 2402, 2404, 2412, 2415, 2416, 2417, 2422 to 2425 inclusive, 2428, 2430, 2434, 2444, 2709, 2712, 2713, 2716, 2716A, 2716B, 2716C, 2716D, 2717, 2816, 2817, 2831, 3347, 3349, 3350, 3352, 3353, 3355, 3357.

Government Exhibits 957A to V were admitted on pp. 2827, 2831.

Government Exhibit 967C, a letter from Wm. N. Clark to Marshall, purporting to bind and prejudice Holcombe, no one being on the stand, was offered over objection of

Holcombe citing the Sixth Amendment to the Constitution.

See pp. 3349, 3350, 3352, 3353, 3355, 3356, 3357 and p. 4089 as to Exhibit 967C.

In this connection it must be noted that *every witness, who was an investor, against Holcombe, exonerated him from any misrepresentation. They testified they made their own investigation or by their attorney and relied on such investigations.* The substantial accuracy of this statement will have to be conceded and that his applications and contracts contained substantially whatever statements were made by him. He took one of his prospects to the Head of the Department of Commerce, Ohio. The prospect invested on Benesch's statement—not Holcombe. *In addition, there is no evidence whatever* that a single request made by Holcombe was complied with by Marshall. The Government had witnesses, investors, on the stand mentioned in those communications but failed to examine them on those parts of the communication which the Government claimed as prejudicial. The Government had the books and could have produced them on their own case, to establish whether the requests made by Holcombe were complied with. They did not do that admittedly. This shows the Government was not interested in proving a vital fact beyond a reasonable doubt, but simply endeavoring to prejudice Holcombe. On this point we cite *Reg. vs. Boulton*, 12 Cox Cr. L. C. p. 87, Court Queens Bench.

All this points to the fact that all of these circumstances were consistent with innocence and that presumption should have been enforced by the Court.

It was while these documents were being offered by the Government and admitted by the Court that the Court stated that, statements made in those communications "were not as a fact inconsistent" with innocence, but he was submitting them to the jury to draw the inference of guilt if they chose. This is what took place.

The Court was reading from one of the communications wherein it appeared that Holcombe said if Marshall would make the payments on certain contracts, that it would enable him to make other sales.

The Court said, pp. 2820, 2821, Transcript, "that reflects on knowledge of Holcombe as to whether he knew what was going on."

The following then appears of record, p. 2821, Transcript:

> Bigger, Attorney: "Is there anything wrong in that kind of a statement, is that statement wholly inconsistent with innocence or consistent."
>
> The Court: "If you asked me *as a matter of fact I would say that it was not inconsistent with innocence,* but I am not passing on that fact, *I am simply passing on the law. It looks to me that if the jury felt the man who wrote that kind of a letter had some idea in his mind about how to get more money out of people.* * * *"
>
> Bigger: *"Is there anything wrong with a man trying to make another sale?"*
>
> The Court: *"That is for the jury."*

The Court said *"he was passing on the law." The Enforcement of the Presumption of Innocence is a pure fundamental question of law.* "It lies at the Foundation of our Criminal Law."

Now here appears a forceful, impressive example of what appellants mean.

It is the law as pointed out in the decisions of the Supreme Court and Circuit Court of Appeals, that where the circumstances relied on for conviction are consistent with innocence, even though consistent with guilt, the trial court must direct a verdict of acquittal.

If that be the law, under the presumption of innocence, and the trial court concedes that the circumstance is consistent with innocence, what right has the jury to say that notwithstanding that is a fact, "we will draw an inference of guilt."

Inasmuch as the jury is required to find guilt beyond a reasonable doubt, they should not be given the opportunity to base a finding of guilt on a circumstance, or circumstances, which are conceded by the Court to be consistent with innocence, which admission and situation creates a reasonable doubt in law. This is emphatically true where there is admittedly no direct proof or evidence of an unlawful agreement.

The Trial Court shows by his words that these documents were relied on as competent, material evidence against Holcombe and that it would not enforce that presumption to protect him under circumstances where the Court frankly admits, under law and the decisions of this Court, that he was entitled to have the rule enforced.

The sole reliance against Holcombe for conviction, was based upon these communications under the presumption of innocence because no witness investor testified against him except he took their applications. This exemplifies the plight of these salesmen.

*The Jury manifestly drew the very inference of guilt as the Court said it might, although the fact was still consistent with innocence* and although "the presumption of innocence still attended him" as stated by the U. S. Supreme Court. This being error, under the decisions of this Court —should require a reversal. (See authorities under Heading II, p. 34, Petition, p. 15 and herein.)

## V.

## THE EXCLUSION OF TESTIMONY BY THE TRIAL COURT OFFERED BY DEFENDANT—MATERIAL TO ISSUE GOOD FAITH.

The Prosecuting Attorney of Franklin County was called by appellants. He was examined by attorneys for appellants.

He stated he had investigated complaints made about the cemeteries, involved in this cause. The Court refused to permit the testimony to be given and heard before the Jury.

He was fully examined out of the hearing of the Jury.

He testified that "he met Holcombe, one of the appellants, in the Deshler Hotel in April 1936, pp. 4546, 4550, 4551, Transcript; that Holcombe told him he heard he had investigated the cemeteries, that he, Holcombe, was thinking of selling sections in the cemeteries and wanted to know what he had found, that blanket charges had been brought to him that this thing was crooked." (pp. 4547, 4549, Transcript.)

Hoskins answered he had investigated complaints made, put an auditor on the books to find if there was anything crooked, that he could not find where any state laws were violated (p. 4550, Transcript), that he found nothing wrong with the matter legally; that there was no reason why he shouldn't go ahead and sell these lots in this particular organization (p. 4550, Transcript); that this was a personal fight between cemeteries. (pp. 4563, 4547, 4568.) He said Holcombe pressed him on the point whether there was anything wrong about it (p. 4583, Transcript) "I told him it was legal, I hadn't found anything." See pp. 4561, 4573, Transcript, as to Holcombe, pp. 4542, 4587 as to entire examination by other counsel. Exception noted, p. 4568.

The Court by refusing to permit this testimony to go to the jury as a circumstance bearing on the state of mind and the issue of good faith of the defendant Holcombe,

prevented him from establishing the first step in his defense as stated in *Derry's Lessee vs. Gray,* 5 Wall. 795, 808.

The testimony was clearly competent and vital to defendant on the issue of good faith. See 31 *C. J.* Sec. 255, p. 1006, Sec. 257, p. 1010, *Wharton Cr. Ev.* 11th Ed. Vol. 1, Sec. 485; Sec. 96, p. 116; 31 *C. J.* Sec. p. 1003, Sec. 252; *Wigmore Ev.* Vol. 6, Sec. 1789, Sec. 1790, p. 239, Vol. 6.

According to the words in the indictment, the prosecutor was investigating the very claim made by the Government, viz., selling lots under false representations.

Of course we realize, that the scheme to defraud and use of the mails, and conspiracy to use the mails are the offenses charged.

But, the Prosecutor investigated the very thing which the indictment also charges. The Prosecutor investigated it because obtaining property by false pretenses is an offense under the state law, Section 13104, General Code of Ohio.

A reading of the colloquy between Judge Nevin and counsel at the time Hoskins' testimony was under discussion shows not only that Judge Nevin misconceived the real purpose of offering Hoskins' testimony, but also that Judge Nevin clearly misconceived the real character of one of the two elements of the crime charged in this indictment. We quote from Judge Nevin's ruling:

> "Now it is perfectly apparent that Mr. Hoskins whatever question he was examining as prosecuting attorney, he was not examining into the question that is involved in this case. He has already indicated that by his answer, one of his answers, and of course, we know that to be true. He was the prosecuting attorney in the state of Ohio. He had nothing to do with this grand jury, or the grand jury had nothing to do with the Federal statutes—an offense under the Federal law. Under the state law, if I remember it correctly, when I used to be prosecuting attorney—that was 25 years ahead of your time, Mr. Hoskins,—and I think at

present, **the offense is obtaining money or property by false pretenses.''**

It is apparent from that language that Judge Nevin grounded his ruling upon the **supposed** difference between the state law of Ohio and the Federal statutes as well as the ruling that Holcombe alone could testify as to what Hoskins advised him, and informed him on the issue of Good Faith. We will later quote the Ohio statute, but it is sufficient now to say that Judge Nevin correctly stated the matter when he said that under Ohio law ''the offense is obtaining money or property by false pretenses.'' Let us first look to the indictment in this case. Page 2 of the indictment clearly grounds the scheme and artifice upon identically the same offense as is defined by the Ohio statutes. We quote from the indictment.

> ''Unlawfully had devised, and intended to devise, a scheme and artifice to defraud and for **obtaining money and property by means of false and fraudulent representations, pretenses, and promises,** from numerous and sundry persons, too numerous to mention herein * * *''

This indictment was framed under Section 338, Title 18, U. S. C. A. The pertinent part of which is as follows:

> ''Whoever having devised or intended to have devised any scheme or artifice to defraud or **for obtaining money or property by means of false or fraudulent pretenses and** * * *''

If we turn to Section 13104 of the General Code of Ohio, we find that the parallel Ohio statute reads:

> ''Whoever, by false pretense and with intent to defraud, obtains anything of value * * * if the value of the property or instrument so procured * * * is thirty-five dollars or more, shall be imprisoned in the penitentiary * * *''

It will thus be seen that the indictment in this case would have been a good indictment in the state court under Section 13104 G. C. The error of the trial judge in reject-

ing this testimony is clearly and conclusively erroneous and highly prejudicial.

The foregoing description and characterization of the scheme in the first paragraph of the indictment is complete. The subsequent paragraphs in the indictment, fourteen in number, only relate to the details of that scheme and the manner of executing it. Each and every one of those fourteen subsequent lengthy paragraphs must relate back to the first paragraph in which the scheme is described as one to "obtaining money or property by false pretenses."

It is evident from Judge Nevin's other discussion which is too lengthy to incorporate in this brief that except for what he conceived to be a difference between the Ohio and the Federal law that he would have admitted this testimony on the question of intent. It seems conclusive therefore that **he had overlooked the fundamental basis of this indictment and that it is essentially grounded upon acts which would have been an offense under the Ohio law.** This being true it necessarily follows that Hoskins was in a position to give sound advice to Holcombe who had not yet entered upon employment as a salesman, and it would seem that no one in the entire world was in position to give more authoritative advice or advice which would be more convincing to Holcombe that he could enter upon the employment as a salesman without being guilty of **any** offense against **any** law pertaining to fraud whether state or Federal.

We say that Hoskins occupied a key position in this matter because he was not only conversant with state law, but he had just completed an investigation of current rumors that the law was being violated. Hoskins was, therefore, not only a man conversant with the law, but his investigation of the very facts which are the basis of this charge of a fraudulent scheme had just been completed and he had found nothing upon which to base the action of a state grand jury.

To deny Holcombe and appellants the benefit of this testimony of these circumstances was not only prejudicial error, but a denial of due process of law by preventing a defendant from putting on the first step in his defense as stated by the United States Supreme Court in 5 Wall. 795, 808, *supra.*

## VI.

## THE MOTION AND AFFIDAVIT FOR NEW TRIAL—BASED ON EXTRANEOUS MATTER CONSIDERED BY JURY PREJUDICIAL TO APPELLANTS.

The appellants believe they had a right to a hearing on their Motion for a New Trial upon the grounds of newly discovered evidence. This was filed in the Appellate Court under Rule 11-(3) of the Rules of Practice and Procedure, promulgated by the Supreme Court, October term 1933, 292 U. S. Appendix IV., pursuant to Act of Congress, March 8, 1934, U. S. C. A. Title 28, Sec. 723A—amended.

If the facts set out in the Motion and Affidavit (p. . . . R) filed October 24, 1942 in support of that Motion are true, and the Jury did discuss at length, extraneous matters prejudicial to appellants then under the applicable decisions of this Court they would be entitled to a new trial. That these matters may be inquired into and should be, would appear to be settled by *Mattox vs. U. S.*, 146 U. S. 140, 147. If the jurors did discuss the cost of trying this case and the time it took and the fact that since defendants exercised their constitutional rights and did not take the stand, that they all must be crooks, then certainly the defendants have a right to invoke the protection of the Court. It is possible that since the Government took 5½ months to put on their case, and one defendant took 3 weeks more, that the other defendants felt they might prejudice their case and antagonize the jury, many of whom were farmers, by taking up another 3 months or more and it is possible they were financially exhausted. The transcript as it is involves 5400 pages of trial costing approximately $5000.00.

## VII.

## THE TRIAL COURT DENIED PERMISSION TO APPELLANTS CROSS EXAMINE MARSHALL.

After Robert Marshall had been examined at great length in his own defense and after being cross examined by the Government for more than ten days, counsel for appellants claimed they ought to cross examine him in their behalf. This was denied by the Trial Judge for reasons set forth in the petition herein.

Since the trial court ruled in effect that Marshall was called by all the defendants and was in effect their witness that may explain why the appellate Court after noting and finding that Marshall devised, planned and executed everything by himself, including what he did before starting the cemetery projects, as well as what happened after May 18, 1938, held that these appellants are bound by what he did, and by what he had in his mind, even though he did not communicate his intentions to them.

The rule, as set forth in the petition herein, declared by the Trial Court was the rule which was actually followed and applied concerning the defendant Marshall. That Marshall's position in this case was radically different from the position of the salesmen is apparent and manifest by this record. It was so found and declared in the opinion of the Court of Appeals because it was stated:

> "While the evidence justified a conclusion of the jury that many of the appellants were guilty of most of the foregoing conduct, and that others participated therein to a much lesser extent, the latter are not thereby exonerated from guilt of the offense charged. In this regard it is to be observed that Marshall may have imposed on some of his own salesmen, and that certain of them may have acted in good faith."

The effect of the ruling of the Trial Court was that each of the appellants would have been bound by any answers made by Marshall to questions propounded by counsel for any of these appellants. We are here concerned with

a general rule of evidence and not by any special rule attempted to be applied to this particular case. Under the rule, declared by the Trial Court, counsel representing other defendants could only examine Marshall by making him their own witness. Any unfavorable answer on his part would be binding upon the defendant, thus interrogating him. Marshall was himself under indictment and like any other co-conspirator would be chiefly concerned with clearing his own skirts, even though it might be at the expense of others who may be indicted with him, but who may be innocent of devising any scheme or entering any conspiracy. Clearly therefore, no co-defendant could afford to take the chance of asking questions, the answers to which might be fatal to his case. The application of the foregoing rule was therefore highly prejudicial to these appellants.

Petitioners therefore believe they have sufficiently demonstrated that the decision of the Circuit Court of Appeals on the face of its own decision alone; not to speak of the record and transcript, is in such violent conflict with the applicable decisions of the Supreme Court and of the United States Circuit Court of Appeals, and the questions involved and rights thereby jeopardized are so important, as to call for a hearing in this Court and the exercise of the revisory powers of this Court to the end that a gross injustice involving the fundamental, constitutional rights and liberties of citizens may be corrected, through the proper channels.

Respectfully submitted,

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